No. 10335

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

DENZEL RIDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

MOTION TO DISMISS APPEAL
AND
APPELLEE'S BRIEF

Upon Appeal from the District Court of the United States for the District of Arizona

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FRANK E. FLYNN,
United States Attorney.

E. R. THURMAN,
Assistant U. S. Attorney.

JAMES A. WALSH,
Assistant U. S. Attorney.
Attorneys for Appellee.

REPUBLIC AND GAZETTE COMMERCIAL PRINTERY, PHOENIX, ARIZONA

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MOTION TO DISMISS APPEAL

COMES NOW United States of America, appellee herein, and moves this Honorable Court that the appeal in the premises be dismissed for the reason that the appellant was placed on probation with imposition of sentence suspended, and, therefore, there was no final judgment from which an appeal would lie.

WHEREFORE appellee prays that appellant's appeal in the premises be dismissed and that appellee recover its costs herein expended.

FRANK E. FLYNN,
United States Attorney.

E. R. THURMAN,
Assistant U. S. Attorney.

JAMES A. WALSH,
Assistant U. S. Attorney.
Attorneys for Appellee.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS APPEAL

In support of the above and foregoing motion, it will be noticed that the court issued the following judgment (T.R. 14):

"JUDGMENT

"Due proceedings having been had on the indictment filed herein presented against the defendant above named charging a violation of Title 38, Sections 510 and 714, United States Code, to-wit: wrongfully, unlawfully and fraudulently receive certain compensation from the United States with the intent to defraud the said United States, as charged in each of counts one to six of said indictment.

"It appearing to the Court that the best interests of the defendant and the Government will be subserved thereby,

"It Is Ordered that the imposition of judgment and sentence herein be suspended for the period of five (5) years from and after this date and that said defendant be placed on probation during said period, on condition that she make restitution of the money unlawfully received, within six months from this date.

"Dated December 7, 1942.

DAVE W. LING,
Judge."

It is evident from reading the above and foregoing that there has been no final judgment entered in the premises from which an appeal would lie, and in support thereof we cite the following cases:

United States v. Albers, et al., 115 F. (2d) 833 (C.C.A. 2), wherein it is held, on page 834 of the opinion, as follows:

"The appeals of the five appellants placed on probation with imposition of sentence suspended must be dismissed. There is a distinction between suspending execution of sentence and suspending imposition of sentence. If sentence is imposed but execution thereof suspended, there is a final judgment from which an appeal will lie. Berman v. United States, 302 U. S. 211, 58 S.Ct. 164, 82 L.Ed. 204. But if imposition of sentence is suspended, no final judgment is entered; hence no appeal is possible. Birnbaum v. United States, 4 Cir., 107 F.2d 885, 126 A.L.R. 1207; United States v. Lecato, 2 Cir., 29 F.2d 694."

and also

United States v. Mook, et al., 2 Cir., 125 F. (2d) 706.

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APPELLEE'S BRIEF

Without waiving the above and foregoing Motion to Dismiss appellant's appeal, and still urging and insisting upon said motion, we now proceed to answer appellant's opening brief.

ARGUMENT

There is but one assignment of error. Appellant complains that the Court erred in rejecting the evidence of appellant contained in her Offer of Affirmative Proof (T.R. 51-55) and in refusing to permit her to testify in her own defense that she believed, when accepting and retaining the six monthly pension checks charged in the indictment, that she was acting lawfully and within her rights.

Appellee finds no fault with the general proposition of law enunciated by appellant in her brief under Specification of Error I.

However, appellee contends that none of the cases set forth in appellant's brief, nor the general proposition of law set forth therein, are applicable to the legal proposition which arises under appellant's Specification of Error.

It will be noted at the bottom of page 6 of appellant's brief she states that her whole defense, as disclosed by her Offer of Affirmative Proof (T.R. 51-55), is predicated upon her belief that her marriage to Lane was void and, in any event, did not affect her right to the checks. She there admits every act attributed to her, but denies that such acts were induced by any design to defraud the United States or any other person, or to violate a law.

The Government takes the position that the general proposition of law, as stated on page 6 of appellant's brief, does not apply. In the instant case, the accused is attempting to excuse herself by asking the Court to permit her to show what her belief was as to her marital status with the said George V. Lane; and, of course, what her belief was as to the law with respect to her said marriage is immaterial and was properly excluded by the Court.

Christensen v. United States, 90 F. (2d) 152, 153.

Bridgeman v. United States, 140 F. 577, 590 (C.C.A. 9).

Fain v. United States, 265 Fed. 474 (C.C.A. 9).

Ford v. United States, 10 F. (2d) 339, 349 (C.C.A. 9).

In the Christensen case, supra, the Court held as follows:

> "At the trial, appellant offered evidence tending to show that he believed the judgment was unjust and was for a sum larger than his indebtedness. The court excluded this evidence, and error is assigned on such exclusion.
>
> "The fact that a judgment debtor believes a judgment rendered against him is excessive and is unjustifiable is not unusual. Such belief, whether sincere or not, does not, however, impeach the validity of the judgment, nor does it justify the judgment debtor in removing the record of such judgment from an abstract of title to real estate upon which it was apparently a lien. This evidence was properly refused."

To the same effect is the Bridgeman case, supra, wherein the defendant was charged with having, as an Indian agent, made and presented a false claim and voucher against the United States, knowing the same to be false and fictitious. On page 590 of the opinion, it is held that testimony offered by the defendant to show a custom or practice of other Indian agents to sign and forward their accounts and vouchers as the same were prepared by the clerks, without reading them, was irrelevant and properly excluded.

This Honorable Court again followed the same rule in Fain v. United States, supra, wherein, on trial of a defendant for having, as special agent of the Land Department, presented false and fraudulent claims for expenses, evidence that regulations respecting expenses in other departments of the service were disregarded in practice was held properly excluded as immaterial.

Applying the rule enunciated in the foregoing cases to the appellant's Offer of Proof in this case, we come

to the conclusion that she was estopped to show her belief as to the legal status of her said marriage to the said George V. Lane, for she knowingly participated in the marriage ceremony, and she knew that she could not lawfully receive the checks in question unless she was the unremarried widow of Arthur C. Rider. What her intentions were at the time she entered into the said marriage with Lane is immaterial, for the marriage was performed and would be binding under the laws of the State of Arizona so long as it continued to exist. It would be a strange thing, indeed, if a defendant would be permitted to offer evidence in his defense to show that he did not intend to commit a crime because he did not believe his marriage to be valid. If defendant, on his trial, could go that far, he could go further and say he did not believe a certain law to be constitutional and therefore he had no intent to commit the act alleged.

Appellee takes the position that if all the things alleged in appellant's Offer of Proof are true, still the marriage would not be void, but merely voidable, for a marriage, the consent to which was induced by fraud or duress, is not void but voidable merely at the suit of the injured party.

> Marriage, 38 C. J., par. 61, page 1300, and cases cited.
>
> Marriage, 38 C.J., par. 70, page 1304, and cases cited.
>
> *Southern Pacific Co. v. Industrial Commission of Arizona,* 54 Ariz. 1; 91 Pac. (2d) 700.

It would make no difference what appellant thought the legal status of her marriage to Lane was, for it is a well settled principle that everyone is presumed to know the law of the land, both common and statutory,

and that one's ignorance of the law furnishes no exemption from criminal responsibility for his acts.

Criminal Law, 16 C.J., par. 52, page 84, and cases cited.

Reynolds v. United States, 98 U.S. 145, 167.

Criminal Law, 22 C.J.S., par. 48, note 37, page 115.

Blumenthal v. United States, 88 F. (2d) 522, 530.

In the Blumenthal case, supra, the court held as follows:

> "It is elementary that every one is presumed to know the law of the land, whether that be the common law or the statutory law, and hence one's ignorance of the law furnishes no defense for criminal acts, and this rule applies where the crime charged is malum prohibitum or malum in se. (citing cases)"

In Reynolds v. United States, supra, the Supreme Court said:

> "A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. Here the accused knew he had been once married, and that his first wife was living. He also knew that his second marriage was forbidden by law. When, therefore, he married a second time, he is presumed to have intended to break the law. And the breaking of the law is the crime. Every act necessary to constitute the crime was knowingly done, and the crime was therefore knowingly committed. *Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law.*" (Italics ours)

In the instant case, appellant knew that it was unlawful to receive the compensation checks in question if she married again, and in spite thereof, it is admitted that she did perform a subsequent marriage and thereafter accepted said compensation checks. Since she accepted the checks after her subsequent marriage to Lane, she is presumed to have intended to break the law; and to permit her to now say that she did not intend to defraud the Government at the time she accepted the checks in question, because she believed that her said marriage to Lane was void, would be novel indeed, and would throw the door open to fraud, perjury, and utter disregard for the laws of the land.

A further ground in support of the Court's reason for excluding appellant's Exhibits A, B and C for Identification is that they were all self-serving, and therefore not admissible.

Nielson v. United States,
24 F. (2d) 802 (C.C.A. 9).

Shreve v. United States,
103 F. (2d) 796 (C.C.A. 9).

Anderson v. United States,
152 Fed. 87 (C.C.A. 9).

In the Nielson case, supra, this Honorable Court held that the exclusion of testimony proffered to show that on the day before the raid on defendant's still, defendant purchased groceries and fishing tackle and said to a witness that he was going fishing, to be proper, for such testimony could in no sense be regarded as of the res gestae, and it was so obviously self-serving that the question of the propriety of excluding it requires no discussion.

If an Offer of Proof contains evidence that is inadmissible and also evidence that is admissible, it is not error for the court to sustain an objection to its introduction as a whole, it being the duty of the party offering the evidence to separate it and to have the court rule separately as to each fact.

McDuffie v. United States,
227 Fed. 961.

Todd v. United States,
221 Fed. 205.

Huntington v. United States,
175 Fed. 950.

Harrison v. United States,
200 Fed. 662.

Sage v. State,
22 Ariz. 151; 195 Pac. 533, citing Harrison v. United States, supra.

Criminal Law, 23 C.J.S., par. 1031, page 408, and cases cited.

Since appellant's Offer of Proof in the court below was limited to disproving any criminal intent on the part of the appellant to defraud the United States Government, it would not be error for the court to refuse to admit it for any other purpose.

CONCLUSION

We respectfully submit that the record in this case fails to disclose that the ruling of the court complained of was erroneous. There is a total lack of any showing that appellant was damaged or prejudiced by the ruling of the court, as complained of in appellant's Specifica-

tion of Error I. The appellant, having had a fair and impartial trial, and her guilt having been established by the verdict of the jury, the conviction should be affirmed.

Respectfully submitted,

FRANK E. FLYNN,
United States Attorney.

E. R. THURMAN,
Assistant U. S. Attorney.

JAMES A. WALSH,
Assistant U. S. Attorney.
Attorneys for Appellee.